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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Import-Export Clause of the United States Constitution (Art. I, sec. 10, cl. 2) bar California from applying its sales tax to the sale of $6,968,252 worth of airplane replacement parts sold by the California taxpayer in California, when the parts were shipped via U.S. common carrier from the taxpayer's facilities in Long Beach, California, "F.O.B. Long Beach", to San Ysidro, California, and when the purchaser had no existing obligation to export the parts upon their arrival in San Ysidro?

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STATE BOARD OF EQUALIZATION
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MCDONNELL DOUGLAS CORPORATION,

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**Petition For Writ Of Certiorari
To The Court Of Appeal Of The
State Of California In And For The
Second Appellate District, Division One**

PETITION FOR WRIT OF CERTIORARI

This petition for writ of certiorari seeks this Court's review of the judgment and opinion of the California Court of Appeal, Second Appellate District, after denial of review by the California Supreme Court on February 11, 1993. Unless this Court acts, state revenues will be seriously eroded through the erroneous application of Import-Export Clause to bar application of sales taxes merely because goods are sold to foreign companies, when those goods are shipped to a destination within the same state instead of exporting them. Summary reversal would be appropriate.

OPINIONS BELOW

The minute order of the California Superior Court (Appendix "A") is an unreported decision. The opinion of the Court of Appeal, Second Appellate District (Appendix "B") was reported at 10 Cal. App. 4th 1413 and Cal. Rptr. 2d 399. The California Supreme Court denied review of February 11, 1993 without opinion (Appendix "C").

JURISDICTION

The California Court of Appeal has held that the Import-Export Clause of the United States Constitution (Art. I, sec. 10, cl. 2) bars California from applying its sales tax to goods in this case prior to their becoming exports. On February 11, 1993 the California Supreme Court denied review of the Court of Appeal decision without opinion. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

United States Constitution, Section 10, Clause 2 (Import-Export Clause):

No State shall, without the consent of the Congress, lay any imposts or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all

such laws shall be subject to the revision and control of the Congress."

California Revenue and Taxation Code § 6006

(a): " 'Sale' means and includes any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for consideration. 'Transfer of possession' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter."

California Commercial Code § 2401(2)(a):

"Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by bill of lading: (a) If the contract requires or authorizes the seller to send the goods to the buyer at the time and place of shipment."

STATEMENT OF CASE

Between January 1, 1978 and December 31, 1980, McDonnell Douglas Corporation ("the taxpayer") sold $6,968,252 worth of aircraft replacement parts to Aeromexico ("the purchaser"). The orders for the parts emanated from the purchaser's Mexico City maintenance department. The parts were shipped "F.O.B. Long Beach",

via common carrier, from the taxpayer's Long Beach facility to a freight forwarder's facilities in San Ysidro, California. (C.T. 27.) The purchaser's employees used the facilities in San Ysidro to assist in preparing the goods for their next shipment to Mexico. The participation of the freight forwarder was limited to providing facilities. Bills of lading for shipping the parts were issued by the seller in Long Beach for the intrastate shipment to San Ysidro and by the purchaser at San Ysidro for the next shipment to Mexico. (C.T. 114.)

Based on these transactions the Board issued a Notice of Determination to the taxpayer on July 3, 1985 for sales tax in the amount of $348,413 and interest of $291,476. The taxpayer paid the assessed deficiency and filed a claim for refund, claiming that the transactions in question were immune from taxation and that the goods transported from Long Beach to San Ysidro, California were in the constitutionally protected "export stream". The Board denied the taxpayer's claim.

The taxpayer filed a Complaint for Recovery of Sales and Use Taxes Paid with the Superior Court of the State of California for the County of Los Angeles. The taxpayer's complaint contended that the aircraft replacement parts were exempt from sales tax because they were in the process of exportation during their journey from Long Beach, California to San Ysidro, California. The Los Angeles Superior Court entered judgment that the taxpayer take nothing, determining that the aircraft replacement parts did not enter the "export steam" until they left San Ysidro, California because they had not started on their "final and continuous journey" until they left San Ysidro, California. (C.T. 113).

The taxpayer appealed this judgment to the Court of Appeal of the State of California, Second Appellate District, Division One, on September 19, 1991. The Court of Appeal entered its judgment reversing the decision of the Superior Court.

The Board filed a petition for review with the Supreme Court of the State of California seeking review of the decision of the California Court of Appeal. The Supreme Court of the State of California denied the petition on February 11, 1993.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEAL CONFLICTS WITH THE DECISIONS OF THIS COURT BY HOLDING THAT A SOLELY INTERIOR MOVEMENT OF GOODS WITHIN A STATE PROVIDES CONSTITUTIONAL IMMUNITY FROM STATE SALES TAX

The trial court, based upon the evidence presented at trial and the record, correctly concluded that the parts which the taxpayer sold to purchaser Aeromexico, which comprise the transactions which the taxpayer claims were exempt from taxation, were not within the constitutionally protected "export stream" when they were shipped from Long Beach, California "F.O.B. Long Beach" by U.S. common carrier to employees of the purchaser at San Ysidro, California because they had not started on their "final and continuous journey." (C.T. 113.) The Export Clause of the United States Constitution is not intended to prohibit a tax on goods merely awaiting

export. An article eventually to be exported does not begin to be an "export", and thus entitled to the protection of the Import-Export Clause, until the article begins its physical entry into the stream of exportation. *Coe v. Errol*, 116 U.S. 517 (1886). The parts were not in transit to Mexico, but rather were in transit to San Ysidro, California, the final destination of the U.S. common carrier.

Without specifying how, when, or why the parts in question entered the constitutionally protected "export stream" during their intrastate journey the California Court of Appeal merely concluded that the parts entered the "export stream" despite the fact that the purchaser took title to the parts at Long Beach, California when they were shipped "F.O.B. Long Beach", and despite the fact that they had not started on their "final and continuous journey." (C.T. 113.)

Pursuant to California law any transfer of "title or possession of tangible personal property . . . for consideration is a sale." California Rev. & Tax Code § 6006. Under applicable California law the transfer of title to the aircraft parts to the purchaser by the taxpayer, at Long Beach, California constituted a sale. The U.S. common carrier merely transported the goods from Long Beach, California to San Ysidro, California where the common carriers obligation ended. The evidence showed that the purchaser had no obligation to export the goods outside the United States at the time the goods arrived at San Ysidro, California from Long Beach. (R.T. 38.) Under the circumstances there was nothing whatsoever which prevented the purchaser from using the parts in California, thereby completely evading the application of the sales tax under the guise of constitutional protection.

The fact that the goods ultimately made their way into Mexico is not significant. "The Export-Import Clause of the United States Constitution was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of cost of local services." *Joy Oil Co. v. State Tax Comm'n.*, 337 U.S. 286, 288 (1949). Goods do not cease to be part of the general mass of property within the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have started upon such transportation in a continuous route or journey. " . . . [P]roducts are not yet exports, nor are they in the process or exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its juridsiction, and liable to taxation there . . . " *Coe v. Errol*, 116 U.S. 517, 525 (1886).

The trial court after listening to the evidence determined that the parts "had not started on their final and continuous journey until they left San Ysidro" because the U.S. common carrier was used solely to accomplish an intrastate transportation of the goods from Long Beach to San Ysidro. The evidence before the trial court clearly showed that the purchaser was under absolutely no obligation to export the airplane parts at the time they arrived at San Ysidro, California. (R.T. 38) Therefore the

decision of the California Court of Appeal, Second Circuit, is erroneous and clearly conflicts with this Court's decisions in the *Coe*, and *Joy Oil* cases.

II.

THERE WAS NO CERTAINTY OF FOREIGN DESTINATION WITH RESPECT TO THE INTRASTATE TRANSPORTATION OF THE PARTS; THE TRANSACTIONS IN QUESTION WERE NOT ENTITLED TO CONSTITUTIONAL IMMUNITY FROM TAXATION

The proper test to be applied to a transaction in order to determine whether constitutional immunity from state taxation is appropriate focuses on whether the goods in question have been committed for export to a foreign destination and will not be diverted to domestic use so as to evade the proper application of tax. *Empressa Siderurgica v. Merced Co.*, 337 U.S. 154, 157 (1949). ". . . It is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it." *Ibid* at p. 156.

This Court in *Brown v. Houston*, 114 U.S. 622 (1885) declared that where a tax is laid on all property alike, it cannot be construed as a duty upon exports under the Import-Export Clause when falling upon goods not then intended for exportation, although the goods should happen to be exported afterwards.

The trial court properly employed this analysis and determined that the parts were not in the "exportation process" at the time they left Long Beach, California

where title passed to the purchaser. (C.T. 113.) The purchaser obtained title to the parts in Long Beach, California when they were shipped by U.S. common carrier, "F.O.B. Long Beach". (California Commercial Code § 2401(2)(a)). Under applicable California law this transfer of title constituted a sale for sales tax purposes. (California Revenue and Taxation Code § 6006).

In this case the U.S. common carrier's journey ended in San Ysidro, California and the purchaser was under no existing obligation to export the parts upon their arrival in San Ysidro. The goods did not merely stop at San Ysidro to complete the export process. "Certainty of foreign destination" was not plain; it plainly did not exist. Where an item not committed to export has not yet begun its final movement from the state of its origin to the country of its destination it is not immune from nondiscriminatory local taxation. *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974).

Contrary to the evidence presented, which showed that there was no legal obligation to export the airplane parts when they arrived at San Ysidro, California, the California Court of Appeal reversed the trial court and held that the parts in question were in the constitutionally protected "export stream"

The decision of the California Court of Appeal, is contrary to existing law. No cited case holds that a solely intrastate movement of goods provides constitutional immunity from taxation. Only articles "in the stream of commerce" are entitled to constitutional protection from state sales tax because, "though intended for exportation,

they may never be exported; the owner has a perfect right to change his mind." *Coe v. Errol*, 116 U.S. 517, 525 (1885).

On February 23, 1993, after the California courts' final action in this case, this Court rejected an attempt to use the Import-Export Clause to bar the states from imposing a state sales tax upon container lease transactions; this Court held that the tax was not upon importation but was "a tax on a business transaction occurring within the taxing state." *Itel Containers Intern. Corp. v. Huddleston*, ___ U.S. ___, 113 S.Ct. 1095, 1106 (1993). Now the states must again look to this Court for protection of their power to impose sales tax on business transactions which occur totally within the seller's state this time for sales transactions which are fully concluded before the purchaser is committed to export the goods whose sale gave rise to the assessment of the tax.

CONCLUSION

Under applicable California law a "sale" of the taxpayer's airplane parts took place in California when title was transferred to the purchaser in Long Beach, California. Cal.Rev. & Tax Code § 6006; California Commercial Code § 2401(2)(a). Unless the parts are in the constitutionally protected "export stream" at the time the sale took place the transaction is subject to a sales tax. The Los Angeles Superior Court correctly held that the parts, "were not in the exportation process at the time they left Long Beach California" and "did not enter the stream of exportation until they left San Ysidro." (C.T. 113.) The California Court of Appeal, erroneously concluded that

the parts were not subject to California Sales Tax during their journey from Long Beach, California to San Ysidro, California because the parts were already in the constitutionally protected process of exportation, despite the fact that title passed to the purchaser in Long Beach and the purchaser had the option to use the parts within California at the time they arrived in San Ysidro, California. The decision of the California Court of Appeal ignores and is contrary to this Court's decision in the *Coe v. Errol, Empresa Siderurgica v. Merced Co., Joy Oil Co. v. State Tax Comm., Kosydar v. National Cash Register* and the *Brown v. Houston* cases. For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the California Court of Appeals, Second Appellate District, Division One in the present case. Particularly in light of this Court's subsequent application of the Import-Export Clause in *Itel Containers Intern. Corp.*, supra, the California appellate court's misapplication of the Import-Export Clause is so clearly erroneous that a summary reversal would be appropriate in this case.

Respectfully submitted,

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DEPT. 302

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: July 3 1991

Honorable	JAN A. PLUIM	, Judge
	J. O'NEAL	, Court Attendant
	G. HASSEN	, Deputy Clerk
	T. Blaylock	, E/R Monitor

C 682 604 (Parties and Counsel checked if present)

McDonnell Douglas Corporation	Counsel For Plaintiff	Robert D. Crockett Alan Chabot
vs.		
State Board of Equalization	Counsel For Defendant	Anthony Sgherzi, Deputy Atty. Gen.

NATURE OF PROCEEDINGS: Civil AO Non Jury

Trial resumes on case continued from July 1, 1991. Counsel for Plaintiff and counsel for defendant make closing arguments to the Court. The Court makes the following findings:

1. As to the Export/Import clause: The Court finds that the replacement parts did not enter the stream of exportation until they left San Ysidro by Mexican common carrier. As stated in the *Farmers' Rice* case and the Administrative Code, "Export has not begun where property is transported from a point in this state to a warehouse or other collecting point in this state even though it

is intended that the property then be transported, and is in fact, transported to another country." The Court also finds that the parts had not started on their "final and continuous journey" until they left San Ysidro. Thus, the Court concludes the replacement parts were not in the exportation process at the time they left McDonnell Douglas in Long Beach and were therefore taxable.

2. As to Revenue and Taxation Code Section 6385: The Court finds that Section 6385 of the California Revenue and Taxation Code does not qualify the sale between 78 & 81 as an exempt sale to a common carrier. The parts in this case were shipped by UPS or a US common carrier from Long Beach to San Ysidro and not by a facility of the purchasing carrier Aeromexico, as required by Sales and Tax Regulation 1621. Further the parts were not shipped to an out-of-state destination. In January of 1980, Section 6385 was amended by adding subsection (b). Said subsection is not helpful to plaintiff because Aeromexico did not transport the parts itself. They were transported either by U. S. common carrier or Mexican common carriers.

3. As to Revenue and Taxation Code Section 6387: Section 6387 is not applicable here because the evidence does not support the fact that Aeromexico is a "forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation". Also Annotation 325.1500 of the Business Taxes Law Guide holds that "where an export packer is also a purchaser the exemption of 6387 does not apply."

Minutes Entered: July 3, 1991

In making the above findings the Court considered the following facts:

1. Bills of Lading were issued not just in Long Beach, but also in San Ysidro.

2. The invoices show that the parts were to be shipped within the State of California by common U.S. carriers.

3. Once the parts left Long Beach, McDonnell Douglas lost control over the parts.

4. The parts were shipped from McDonnell Douglas to Aeromexico is San Ysidro, CA.

5. Some of the invoices reflected that sales tax was billed to Aeromexico by McDonnell Douglas Co.

6. There was no evidence presented that the seller and purchaser agreed that a particular form of transportation was to take place between San Ysidro and Mexico City. In fact there was no contract between Am-Mex International and Aeromexico to deliver the parts to Mexico City.

7. There was no evidence showing that at the time of the purchase, other than delivery to San Ysidro, that a date of exportation was contemplated to and agreed upon by purchaser and seller.

8. Unlike the *Gough* case there was no exportation number received for the parts.

9. All customs arrangements for importing into Mexico were made after shipment had been made to San Ysidro.

Counsel for the Defendant shall give notice of this ruling and prepare judgment herein.

[No. B061726. Second Dist., Div. One. Nov. 10, 1992.]

McDONNELL DOUGLAS CORPORATION, Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION, Defendant and Respondent.

SUMMARY

The trial court, in a sales tax refund action, ruled that aircraft parts sold to a Mexican airline to service its airplanes were not exports exempt from state sales taxes (U.S. Const., art. I, § 10, cl. 2; Rev. & Tax, Code, § 6352), and entered judgment denying the refund. The airline received the parts at the manufacturer's California plan and shipped them by common carriers to the United States-Mexican border, after which a forwarding agent processed them through customs, the parts then being loaded onto Mexican common carriers and shipped to a Mexico City maintenance facility. (Superior Court of Los Angeles county, No. C682604, Jan A. Pluim, Judge.)

The Court of Appeal reversed and remanded with instructions to vacate the judgment and enter judgment for the taxpayer. The Court held that when an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States constitution (U.S. Const., art. I, § 10, cl. 2) if at the time title passed the certainty of the foreign destination was plain. Thus, the court held, the sale of airplane parts was exempt from taxation: all the documents indicated that the parts were for export, the Mexican airline took title in California and only shipped the parts by truck because they were too large and in too great a quantity to be flown in its own

aircraft, and the airline's clear plan to ship the parts to Mexico for its own use was acted on and continued uninterrupted to completion other than for unavoidable delays incidental to their journey. (Opinion by Ortega, J., with Spencer, P.J., and Dunn, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) **Sales and Use Taxes § 17 – Sales Tax – Transactions Subject to Tax – Exemptions – Foreign Commerce – What Constitutes Export – Export Stream. –** The trial court erred in ruling that aircraft parts sold to a Mexican airline to service its airplanes were not exports exempt from state sales taxes (U.S. Const., art. I, § 10, cl. 2; Rev. & Tax. Code, § 6352), where the airline received the parts at the manufacturer's California plan and shipped them by common carriers to the United States-Mexican border, after which a forwarding agent processed them through customs, the parts then being loaded onto Mexican common carriers and shipped to a Mexico City maintenance facility. All the documents indicated that the parts were for export, the Mexican airline took title in California, and it only shipped the parts by truck because they were to large and in too great a quantity to be flown in its own aircraft. The airline's clear plan to ship the parts to Mexico for its own use was acted on and continued uninterrupted to completion other than for unavoidable delays incidental to their journey.

---

* Judge of the Municipal Court for the Long Beach Judicial District sitting under assignment by the Chairperson of the Judicial Council.

[Property destined for, or in course of, removal from state as subject to taxation therein, note, 11 **A.L.R.2d** 938. See also **Cal.Jur.3d,** Sales and use Taxes, § 40;9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Taxation, § 60.]

(2) **Taxpayers' Remedies § 14 – Proceedings in Actions to Recover Taxes Paid – Review – Questions of Law.** – When presented with uncontradicted facts on appeal in tax matters, the appellate court is free to make its own determinations.

(3) **Sales and Use Taxes § 3 – Nature and Purpose.** – California's Sales and Use Tax Law (Rev. * Tax. Code, § 6001 et seq.) acts as a double filter designed to catch all transactions involving the purchase or enjoyment of tangible personal property in the state. The sales tax applies only to retail sales in California.

(4) **Taxpayers' Remedies § 13 – Proceedings in Actions to Recover Taxes Paid – Evidence – Burden of Proof.** – The burden is one a taxpayer claiming an exemption to show entitlement to the exemption. Doubt as to the applicability of the exemption is to be resolved against the exemption, and those rules apply when the taxpayer seeks a sales tax refund.

(5) **Sales and Use Taxes § 17 – Sales Tax – Exemptions – Foreign Commerce – Construction of Statutes.** – Although statutes granting exemption from taxation are strictly construed to the end that such concession shall not be enlarged nor extended beyond the plain meaning of the language employed, the rule does not apply to the export exemption (Rev. & Tax. Code, § 6352), since it was created by the United States Constitution, not state statute.

(6) **Sales and Use Taxes § 17 – Sales Tax – Exemptions – Foreign Commerce – Application.** – Goods do not cease to be part of the general mass of property in the

state subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started on such transportation in a continuous route or journey. Under that test, it is not enough that there is an intent to export, or a plan that contemplates exportation, or an integrated series of events that will end with it. The tax immunity runs to the process of exportation and the transactions and documents embraced in it. It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Where an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the United States Constitution (U.S. Const., art. I, § 10, cl. 2) if at the time title passed the certainty of the foreign destination was plain.

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OPINION

ORTEGA, J. –

INTRODUCTION

Plaintiff McDonnell Douglas Corporation (MDC) sold aircraft parts to Aeromexico, the Mexican national airline, to service Aeromexico's airplanes. Aeromexico received the parts at MDC's Long Beach plant and shipped them by United States (U.S.) common carriers to the U.S.-Mexican border at San Ysidro, California, where AM MEX International, a forwarding agent, processed them through U.S. and Mexican customs. After a 48-hour customs delay, the parts were loaded onto Mexican common carriers and shipped to Aeromexico's Mexico City maintenance facility.

Although the U.S. Constitution and the Revenue and Taxation Code[1] except exports from state sales taxes, defendant California State Board of Equalization (the Board) assessed MDC sales tax on the parts. The Board claimed that the parts were not in the "export stream" until they left the border and thus were subject to sales tax. MDC paid the tax under protest and sued the Board for a refund. After a court trial, the trial court entered judgment for the Board. MDC appeals. We agree with MDC that the parts were in the "export stream" and thus were sales tax-exempt exports. We reverse the judgment.

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[1] Unless otherwise indicated, all further statutory references are to the Revenue and Taxation Code.

Facts

Beginning in 1968, MDC sold Aeromexico aircraft parts to service Aeromexico's airplanes, nearly all of which were MDC manufactured. MDC produced nearly all the parts at its Long Beach factory. Aeromexico's primary service and maintenance facility was in Mexico City. Between January 1, 1978, and December 31, 1980, the period for which the Board assessed the disputed tax, MDC delivered approximately 8,000 such orders, averaging about 10 each working day, worth nearly $7 million, to Aeromexico. All orders originated in Mexico, showed Mexico City as the destination, and stated that the parts were for export to Mexico. Aeromexico received and took title to the parts free on board (f.o.b.) in Long Beach. Aeromexico's regular flights between Los Angles and Mexico City were almost all passenger flights on small, narrow-bodied, twin-engine DC-9 aircraft incapable of carrying more than a small percentage of the parts. Moreover, during the relevant years, Mexican law prohibited U.S. common carriers from operating in Mexico, and U.S. law permitted Mexican common carriers to operate in the U.S. only in the immediate border area.

Other than the few small items flown directly from Los Angeles to Mexico City on Aeromexico aircraft, on which the board did not assess sales tax, Aeromexico shipped the parts, packaged for export, from Long Beach on U.S. common truck carriers to the U.S.-Mexican border at San Ysidro. Aeromexico retained title and the U.S. common carriers received possession. Separate lading bills were prepared at Long Beach and San Ysidro. Aeromexico had no maintenance or landing facilities at San Ysidro, which lacked rail connections or east-west

transportation routs. At San Ysidro, Aeromexico employees assisted AM MEX, an independent freight forwarder, in processing the shipments through U.S. and Mexican customs. Aeromexico used AM MEX's facilities, expertise in U.S. and Mexican customs regulations and fees, and relationships with both countries' customs officials. AM MEX neither took title to the shipments nor was legally obligated to ship the parts to Mexico City. The shipments were not opened, inspected, or repackaged. After the approximately 48 hours required to complete customs processing, the parts were loaded onto Mexican common carriers and trucked to Mexico City. All the parts arrived in Mexico City.

The Board issued Aeromexico a registration certificate as a Mexican exporter, authorizing the San Ysidro transfers, in 1968 and continually renewed it during and after the relevant period. The board did not assess sales tax on the shipments until January 1, 1978. MDC collected and paid sales tax on a small percentage of the shipments during the relevant period because in those few cases. Aeromexico failed to provide MDC adequate documentation of the shipping process.

On July 3, 1985, the Board assessed MDC $348,413 in deficient sales tax and $291,476 in interest on the nearly $7 million of MDC's January 1, 1978, to December 31, 1980, Aeromexico parts sales. MDC paid the tax and interest under protest, petitioned for redetermination, and filed a refund claim. The board denied the petition and claim. On April 8, 1988, MDC filed this case, seeking a refund. The case was tried in the court based on the facts alleged in the complaint, stipulated facts, and four witnesses' oral testimony.

The court found and entered judgment for the Board, stating: "1. As to the Export/Import clause: The court finds that the repla[c]ement parts did not enter the stream of exportation until they left San Ysidro by Mexican common carrier. As stated in . . . *Farmers' Rice [Cooperative v. County of Yolo* (1975) 14 Cal.3d 616 (122 Cal.Rptr. 65, 536 P.2d 465)] . . . and the Administrative Code, 'Export has not begun where property is transported from a point in this state to a warehouse or other collecting point in this state even though it is intended that the property then he transported, and is in fact, transported to another country.' The Court also finds that the parts had not started on their 'final and continuous journey' until they left San Ysidro. Thus, the Court concludes the replacement parts were not in the exportation process at the time they left [MDC] in Long Beach and were therefore taxable.

"2. As to . . . [s]ection 6385: The Court finds that [s]ection 6385 . . . does not qualify the sale between [19]78 & [19]81 as an exempt sale to a common carrier. The parts . . . were shipped by UPS or a US common carrier from Long Beach to San Ysidro and not by a facility of the purchasing carrier Aeromexico, as required by Sales and [Use] Tax Regulation 1621. Further, the parts were not shipped to an out-of-state destination. In January of 1980, [s]ection 6385 was amended by adding subsection (b). Said subsection is not helpful to [MDC] because Aeromexico did not transport the parts itself. They were transported either by U.S. common carrier or Mexican common carriers.

"3. As to . . . [s]ection 6387: [s]ection 6387 is not applicable here because the evidence does not support

the fact that Aeromexico is a 'forwarding agent, export packer, or other person engaged in the business of preparing goods for export or arranging for their exportation'. Also Annotation 325.1500 of the Business Taxes Law Guide holds that 'where an export packer is also a purchaser the exemption of [section] 6387 does not apply.'

"In making the above findings the Court considered the following facts: [¶] 1. Bills of Lading were issued not just in Long Beach, but also in San Ysidro. [¶] 2. The invoices show that the parts were to be shipped within- . . . California by common U.S. carriers. [¶] 3. Once the parts left Long Beach, [MDC] lost control over the parts. [¶] 4. The parts were shipped from [MDC] to Aeromexico i[n] San Ysidro, CA. [¶] 5. Some of the invoices reflected that sales tax was billed to Aeromexico by [MDC]. [¶] 6. There was no evidence presented that the seller and purchaser agreed that a particular form of transportation was to take place between San Ysidro and Mexico City. In fact there was no contract between Am-Mex . . . and Aeromexico to deliver the parts to Mexico City. [¶] 7. There was no evidence showing that at the time of the purchase, other than delivery to San Ysidro, that a date of exportation was contemplated to and agreed upon by purchaser and seller. [¶] 8. Unlike . . . *Gough [Industries v. State Board of Equal.* (1959) 51 Cal.2d 746 (336-p.2d 161)] . . . there was no exportation number received for the parts. [¶] 9. All customs arrangements for importing into Mexico were made after shipment had been made to San Ysidro."

Issues

(1a) MDC contends the trial court erred because the Aeromexico parts sales were in the "export stream" and thus were sales tax-exempt exports under the import-export clause of the U.S. Constitution and section 6352. /MDC also contends sections 6385 and 6387 and California Code of Regulations, title 18, section 1621, which exempt from sales tax sales to common carriers and forwarding agents, and excuse compliance with lading bills procedures, bar the Board from imposing sales tax on the parts sales.[2]

Discussion

"This case was presented to the trial court upon stipulations of fact and oral and documentary evidence which supplemented the stipulations. As there was no conflict in the evidence the decisive facts are undisputed and we are confronted with questions of law and not bound by findings of the trial court. [Citations.]" *Mole-Richardson Co. v. Franchise Tax Bd.* (1990) 220 Cal.App.3d 889, 894 [269 Ca.Rptr. 662].) (2) "When presented with uncontradicted facts on appeal in tax matters, the appellant court is free to make its own determinations. [Citation.] Our review of the legal question at issue is undertaken independently and we are not bound by the trial court's determination." (*Rain Bird Sprinkler Mfg. Corp. v. Franchise Tax Bd.* (1991) 229 Cal.App.3d 784, 794

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[2] Because we conclude MDC's Aeromexico parts sales were sales tax-exempt exports, we need not address MDC's second contention.

[280 Cal.Rptr. 362].) Thus, in reviewing the undisputed facts before us, we apply our independent judgment to this legal question.

(3) "California's Sales and Use Tax Law (. . . § 6001 et. seq.) acts as a 'double filter designed to catch all transactions' involving the purchase or enjoyment of tangible personal property *in this state.* [Citation.] The sales tax applies only to retail sales *in California.* (§ 6051.)" (*Parfums-Corday, Inc. v. State Bd. of Equalization* (1986) 187 Cal.App.3d 630, 634 [232 Cal.Rptr. 56], fn. omitted, italics added.)

However, "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, accept what may be absolutely necessary for executing its inspection Law: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the [U.S.]; and all such Laws shall be subject to the Revision and Controul of the Congress." (U.S. Const., art. I, § 10, cl. 2.) "There are exempted from the [sales] taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the [U.S.]. . . . " (§ 6352.) The dispositive issue before us is whether MDC's Aeromexico aircraft parts sales are exports exempt from the otherwise applicable state sales tax.

(4) Guiding our analysis, "[t]he Board correctly urges the following propositions: the burden is on the

taxpayer claiming an exemption to show entitlement to the exemption. (. . . § 6091.) Doubt as to the applicability of the exemption is to be resolved against the exemption. [Citations.]" (*American Hospital Supply Corp. v. State Bd. of Equalization* (1985) 169 Cal.App.3d 1088, 1091-1092 [215 Cal.Rptr. 744].) Those rules apply where, as here, the taxpayer seeks a sales tax refund: "In a suit for refund of tax, the burden of proof is on the taxpayer. [Citation.]" (*Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744 [180 Cal.Rptr. 479].)

(5) Although the Board correctly argues that " 'statutes granting exemption from taxation are strictly construed to the end that such concession will not be enlarged nor extended beyond the plain meaning of the language employed[]' . . . " (*Parfums-Corday, Inc. v. State Bd. of Equalization, supra,* 187 Cal.App.3d at p. 637), the export exemption was created by the U.S. Constitution, not state statute. The Board's argument does not apply because it "would fail to give to exports the liberal protection that hitherto they have received. . . . " (*Spalding & Bros. v. Edwards* (1923) 262 U.S. 66, 70 [67 L.Ed. 865, 867-868, 43 S.Ct. 485].) With these principles in mind, we turn to the issue.

(6) The parties correctly agree that "goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey." (*Coe v. Errol* (1886) 116 U.S.

517, 527 [29 L.Ed. 715, 718-719, 6 S.Ct. 475].)[3] "Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. [Citation.] The tax immunity runs to the process of exportation and the transactions and documents embraced in it. [Citations.]" (*Empresa Siderurgica v. Merced Co., supra,* 337 U.S. at p. 156 [93 L.Ed. at pp. 1279-1280].)" "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be delivered to domestic use. Nothing less will suffice." (*Id.* at p. 157 [93 L.Ed. at p. 1280].)[4] "[W]here an article is manufactured and sold in one of the states for export to a foreign country, it is free from state sales tax under the import-export clause of the [U.S.] Constitution if at the time title passed the certainty of the foreign destination was plain." (*Gough Industries v. State Board of Equal.* (1959) 51 Cal.2d 746, 749 [336 P.2d 161].) (**1b**)

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[3] Although *Coe* dealt with the commerce, rather than the import-export, clause of the U.S. Constitution, "the meaning of 'export' is the same under" the commerce clause and the import-export clause. (*Empresa Siderurgica v. Merced Co.* (1949) 337 U.S. 154, 156, fn. 2 [93 L.Ed. 1276, 1279-1280, 69 S.Ct. 995]; *Richfield Oil Corp. v. State Board* (1946) 329 U.S. 69, 83 [9] L.Ed. 80, 93, 67 S.Ct. 156].)

[4] While later cases expanded the analysis to include other factors, at least where, as here, the tax is assessed on exported goods and not related services, the export exemption still applies to goods in the "export stream." (See *Washington Rev. Dept. v. Stevedoring Assn.* (1978) 435 U.S. 734, 751-761 [55 L.Ed.2d 682, 697-704, 98 S.Ct. 1388]; *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276, 279, 290-294 [46 L.Ed.2d 495, 506-508, 96 S.Ct. 535].)

Although the parties agree on these general principles, they dispute whether MDC's aircraft parts sold to Aeromexico had entered the export stream and thus were exempt from sales tax.

In *Coe v. Errol, supra,* 116 U.S. 517, the court upheld New Hampshire's tax on logs cut within the state and floated downriver for eventual sale in Maine. Although the usual practice was to bring the logs to Maine for sale, at the time the tax was imposed, the logs were in New Hampshire awaiting eventual but indefinite transport to Maine and had not been sold to potential buyers or delivered to a common carrier.

In *Spalding & Bros. v. Edwards, supra,* 262 U.S. 66, a Colombian company contracted with New York commission merchants to buy baseball bats and balls from a New York baseball equipment manufacturer for export to Colombia. Based on instructions from the Colombian company, the commission merchants instructed the manufacturer to specially package the equipment for export and deliver it to a common carrier. Upon delivery, the common carrier gave the manufacturer a receipt which the manufacturer sent to the commission merchants in exchange for an export bill of lading. The commission merchants paid the manufacturer for the equipment. When the equipment was delivered to Colombia, the Colombian company paid the merchants' commission. The court invalidated a tax previously paid by the manufacturer under protest because the equipment was a tax-exempt export. The court rejected the argument that the tax should be upheld because the commission merchants, who retained title until delivery to Colombia, "might change their mind and retain the bats and balls

for their own use. There was not the slightest probability of any such change and it did not occur. . . . Theoretical possibilities may be left out of account." (*Id.* at p. 70 [67 L.Ed. at pp. 867-868].)

In *Richfield Oil Corp. v. State Board, supra,* 329 U.S. 69, a California oil company contracted to sell oil to the New Zealand government. The oil was to be delivered f.o.b. at Los Angeles, payment to be made in London. Delivery was to be made to a New Zealand naval tanker in Los Angeles for delivery to New Zealand. Richfield pumped the oil through pipelines from its California refinery to storage tanks at a California port. When the tanker arrived, Richfield pumped the oil from the tanks to the ship. Richfield gave the ship's captain a bill of lading listing Richfield as shipper and consigning the oil to the New Zealand government in Auckland. The tanker delivered the oil as agreed. None of the oil was used or consumed in the U.S. When the Board assessed sales tax on the oil, Richfield paid under protest and sued for a refund. The California Supreme Court upheld the tax, but the U.S. Supreme Court reversed, holding that the oil was a tax-exempt export.

The court stated: "the certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks

located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant so long as the certainty of the foreign destination is plain."* (*Richfield Oil Corp. v. State Board, supra,* 329 U.S. at pp. 82-83 [91 L.Ed. at pp. 92-93], fn. omitted, italics added.)

In *Empresa Siderurgica v. Merced Co., supra,* 337 U.S. 154, a Colombian company bought a Merced County, California, cement plant for export to Colombia. The buyer paid for and took title to the plant in California and obtained an export license. The buyer hired a common carrier to dismantle and pack the plant for shipment and deliver the shipments to a rail carrier for delivery to the buyer. The county assessed property taxes on the portion of the plant remaining in the county when assessed, even those portions already dismantled and packed for shipment. No tax was assessed on the 12 percent of the plant already shipped out of the county. The court upheld the tax because "it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had

not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." (*Id.* at p. 157 [93 L.Ed. at p. 1280].)

In *Gough Industries v. State Board of Equal., supra,* 51 Cal.2d 746, a California electrical products manufacturer sold products to a Saudi Arabian oil company for use in Saudi Arabia. The contract and purchase order included a required export date and special export number and specified that the goods were for export and were to be delivered to a common carrier for special export packaging and delivery to Saudi Arabia. Title passed when the manufacture delivered the goods by truck to a packing company in Wilmington. The packing company packed the goods according to the buyer's specifications and forwarded them by truck to the port, where they were loaded on ship and delivered to Saudi Arabia.

The court held the goods were tax-exempt exports: "(a) the agreement of sale contemplated shipment of the goods in export, that is, from a seller in the [U.S.] to a buyer in a foreign country; (b) from the beginning of the transaction, the goods were committed to go all the way to the foreign country; (c) the movement of the goods had actually started when the tax was sought to be imposed;

and (d) the journey was continuous and unbroken by any action or delay taken for a purpose independent of the transportation of the goods. [¶] Therefore, it is immaterial that the goods were shipped to the packer in Wilmington and there packed for ocean travel, such being incidental and necessary for the safe transportation of the goods [citation], or that there was a change in the form of transportation from overland travel by truck to overseas travel by ship, with incidental preparation for the latter [citations]. [¶] . . . [¶] The fundamental difference between the Empresa case and the present one is this: In the Empresa case, the movement of the goods sought to be taxed had not started when the tax was imposed, while in the present case the movement of the goods had started on a continuous journey in foreign commerce . . . when the tax was imposed." (*Gough Industries v. State Board of Equal., supra,* 51 Cal.2d at pp. 749-750.)

Applying these principles to the facts before us, we conclude that MDC's Aeromexico parts sales were tax-exempt exports. Aeromexico bought the parts for maintenance of its aircraft. All the documents indicated that the parts were for export to Aeromexico's Mexico City maintenance facility. Aeromexico took title in California and only shipped the parts by truck because they were too large and in too great a quantity to be flown to Mexico City in its own aircraft. Aeromexico only used AM MEX because U.S. trucks could not legally transport the parts from Long Beach to Mexico City. AM MEX never took title to the goods and merely facilitated their transfer to Mexican trucks to complete the journey. Indeed, the minimal border delay would have been greater had Aeromexico not used AM MEX's specialized services. The goods

were delivered into the export stream and never diverted or delayed, other than for the border transfer without which they could not have completed their journey. Aeromexico had no use for the parts at the border, and never attempted to, or did, divert the parts. All the parts were delivered to Aeromexico's Mexico City maintenance facility. As in *Gough, Richfield,* and *Spalding,* and unlike in *Empresa* and *Coe,* Aeromexico's clear plan to ship the parts to Mexico City for its own use was acted upon and continued uninterrupted to completion other than for unavoidable delays incidental to their journey.

The Board's reliance on two additional cases is misplaced. In *Hugo Neu Corp. v. County of Los Angeles* (1970) 7 Cal.App.3d 21 [86 Cal.Rptr. 332], a Terminal Island scrap processing company bought steel scrap from a variety of independent suppliers who had no contractual relationship with the processing company. Title passed at the company's plant when the company bought it from the suppliers. The company processed the scrap into reuseable material and, pursuant to contract, shipped it to a group of Japanese manufacturers. All the scrap eventually was shipped to the Japanese buyers. However, Los Angeles County assessed property taxes on the unprocessed and processed scrap still on Terminal Island. The court found the tax proper because, although the company intended to ship the scrap to Japan, it had not yet begun its journey. Here, the parts already were at the border when the Board assessed the tax, and Aeromexico could not legally have avoided the delay.

In *Farmers' Rice Cooperative v. County of Yolo* (1975) 14 Cal.3d 616 [122 Cal.Rptr. 65, 536 P.2d 465], the cooperative stored rice in port grain elevators while awaiting

shipment to buyers. The court upheld assessment of property taxes on such stored rice, although the cooperative had contracted to sell it to Okinawan and Puerto Rican buyers, because the rice was still in storage when the tax was assessed. Again, in our case the parts already were in transport at the border and briefly delayed only for the legal necessity of transferring them to Mexican trucks.

Thus, we conclude that MDC's Aeromexico parts sales were tax-exempt exports.

Disposition

We reverse the judgment. The case is remanded to the trial court with instructions that it vacate its earlier judgment and enter judgment for MDC.

MDC is entitled to its costs on appeal.

Spencer, P.J., and Dunn, J.,* concurred.

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* Judge of the Municipal Court for the Long Beach Judicial District sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX "C"

C1

Second Appellate District, Division One,
No. B061726 S030279

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

(Filed Feb. 11, 1993)

MCDONNELL DOUGLAS CORPORATION, Appellant

V.

STATE BOARD OF EQUALIZATION OF THE
STATE OF CALIF., Respondent

Respondent's petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

Supreme Court, U.S.
FILED
JUN 11 1993
OFFICE OF THE CLERK

No. 92-1803

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California In and for the Second Appellate District, Division One

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do goods lose their protection as protected exports under the Import-Export Clause of the United States Constitution (art.-I, § 10, cl. 2), and thereby become subject to a State's sales tax, if the buyer detains the goods at the international border in the State for less than 48 hours to transfer the goods from U.S. to Mexican common carriers solely to accommodate U.S. and Mexican transportation laws?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1803

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California In and for the Second Appellate District, Division One

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent McDonnell Douglas Corporation ("MDC")[1] respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the California Court of Appeal, Second Appellate District, after the California Supreme Court denied review on February 11, 1993.

STATEMENT OF CASE[2]

Aeromexico, the Mexican national airline, operated from Mexico City an international fleet of aircraft manufactured by MDC. (App. to Pet. for Cert. at B5, B6.)

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[1] Pursuant to Rule 29.1, MDC discloses Finnish American International Trade, Inc. as its only corporate parent, subsidiary (other than wholly-owned subsidiaries) or affiliate.

[2] Pursuant to Rule 15 of this Court, Respondent states that it does not agree with the Petitioner's abbreviated Statement of Case.

Aeromexico purchased aircraft parts from MDC to maintain and service its fleet only at Mexico City. From Mexico City, Aeromexico placed orders with MDC for the parts, showing Mexico City as the destination, and stating that the parts were "FOR EXPORT TO MEXICO." (App. to Pet. for Cert. at B6.)

MDC delivered all the parts F.O.B. Long Beach, California, to United States common carrier trucks. Title passed to Aeromexico upon delivery to the common carriers. MDC and Aeromexico used surface trucks because Aeromexico's DC-9 aircraft were too small to handle the parts. (*Id.*)

Due to prohibitions of U.S. and Mexican laws, exporters using surface transport typically transfer goods from U.S. common carriers to Mexican carriers on the U.S. side of the border. This transfer occurs at "freight forwarders." (*Id.*)

Aeromexico used AM MEX International as its freight forwarder at the international border, San Ysidro, California, to make the truck transfers to Mexican trucks. Aeromexico used AM MEX's expertise in U.S. and Mexican customs regulations and fees. Aeromexico depended on AM MEX's relationship with both countries' custom officials. Aeromexico stationed employees at San Ysidro to oversee the transfers. No person, neither freight forwarder nor Aeromexico employee, inspected, repackaged, or opened the packaged parts while at San Ysidro. The parts spent less than 48 hours at San Ysidro during the transfer operation. All parts had been previously packaged and conditioned for export. Without exception, every one of 8,000 shipments went to Mexico City. (App. to Pet. for Cert. at B6, B7, B18, B19.)

Aeromexico had no use for the parts at San Ysidro. (App. to Pet. for Cert. B19.) There was no likelihood that the parts would be diverted. They were not diverted. Aeromexico could not install the parts in California. Aeromexico had no maintenance or landing facilities at San Ysidro. (App. to Pet. for Cert. at B6, B19.)

On July 3, 1985, the Petitioner assessed a $639,889 deficiency of sales and use tax and interest on the delivery of parts by MDC to Aeromexico. (App. to Pet. for Cert. at B7.) MDC brought an action to recover taxes. A California trial court rendered judgment against MDC on July 29, 1991. (App. A to Pet. for Cert.) A California Court of Appeal reversed, ordering judgment for MDC. (App. to Pet. for Cert. at B20.) On February 11, 1993, the California Supreme Court denied without comment the Petitioner's petition for review.

ARGUMENT

There is neither an important question of federal law nor any conflict with prior decisions of this Court. Without comment, the California Supreme Court denied review of the Petitioner's State petition for review, undoubtedly because this Court's prior decisions articulate adequate guidance to state taxing authorities.

I. NO IMPORTANT QUESTION OF FEDERAL LAW EXISTS

As the California Court of Appeal stated, "there was no conflict in the evidence [and] the decisive facts are undisputed." (App. to Pet. for Cert. at B10.) The parties also agreed as to the rule of law. (App. to Pet. for Cert. at B12.) The California Court of Appeal was left only to weigh and sift complicated but uncontroverted facts and apply the uncontroverted law to the facts. "Applying these principles to the facts before us, we conclude that MDC's Aeromexico parts sales were tax-exempt exports." (App. to Pet. for Cert. at B18.) The California Court of Appeal looked at the contents of documents indicating an intention to export, and examined the manner Aeromexico took title, the reasons for using freight forwarders, the purpose for the border delay, the likelihood of diversion, Aeromexico's lack of alternative uses at the border, and other facts. (App. to Pet. for Cert. at B18-19.)

Regarding the rule of law, the parties "correctly agree" that

> "goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

(App. to Pet. for Cert. at B12, citing *Coe v. Town of Errol,* 116 U.S. 517, 527 (1886) (Commerce Clause decision [3]).)

> "Under that test, it is not enough that there is an intent to export, or a plan which contemplates exportation or an integrated series of events which will end with it. . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use."

(App. to Pet. for Cert. at B13, citing *Empresa Siderurgica, S.A. v. County of Merced,* 337 U.S. 154, 157 (1949).)

The law is neither unsettled nor in conflict. The Petitioner lost nearly identical issues of fact and law before this Court in *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946), which invalidated a California sales tax upon oil briefly detained at the California border. The Petitioner now hopes to reargue its loss almost fifty years later. There is no reason to overrule *Richfield,* and this Court previously has stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). Where, as here, the facts and law are not

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[3] "[T]he meaning of 'export' is the same under" the Commerce Clause and the Import-Export Clause. *Empresa Siderurgica, S.A. v. County of Merced,* 227 U.S. 154, 156 n.2 (1949). The Commerce Clause is article I, section 9, clause 5 of the United States Constitution: "No tax or duty shall be laid on articles exported from any State."

in dispute, no federal interest would compel this Court to apply complicated facts to determine a result different from the California Court of Appeal's decision.

II. THE CALIFORNIA INTERMEDIATE COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS

The Petitioner would have this Court believe that a taxpayer automatically loses constitutional protection against levies on exports if goods are interrupted or detained within the State where the export begins its physical movement: "No cited case holds that a solely intrastate movement of goods provides constitutional immunity from taxation." (Pet. for Cert. at 9.) The Petitioner, however, does not account for this Court's Import-Export Clause decisions examining brief intrastate interruptions.

Regarding goods which have physically moved inside a State along their foreign journey, several decisions have held levies to be unconstitutional despite a brief interruption in the journey within the State of export. As mentioned previously, this Court has invalidated California's application of a sales tax to exports detained at the international border. In *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946), this Court held unconstitutional California's attempt to levy upon oil the taxpayer sold to the New Zealand government. The taxpayer pumped the oil first to harbor storage tanks, where it was delivered F.O.B. Los Angeles to a New Zealand naval vessel harbored within California waters. *Id.* at 71, 83. This Court held that the test for application of constitutional protection is "whether the 'export had begun' " at the time the tax accrued. *Id.* at 81. Notwithstanding the interruption at the California border, this Court looked at the "certainty that the process of exporation has started," *id.* at 82-83, and determined that the fact the goods "have been delivered to a common carrier" for the purpose of export is "best" evidence of export. *Id.* Even though the purchaser took delivery of the oil in California, "there was nothing equiv-

ocal in the transaction which created even a probability that the oil would be diverted to domestic use." *Id.* at 83.

In *A.G. Spalding & Bros. v. Edwards,* 262 U.S. 66 (1923), a domestic corporation delivered baseball bats to a New York exporter, which transferred them to an off-shore carrier. The exporter processed the receipt and bill of lading and gave directions for packaging. The Internal Revenue Service imposed a war revenue tax on Spalding, arguing that the transfer from Spalding to the exporter gave rise to a taxable sale. This Court held the tax unconstitutional, declaring that the test was whether "the export [of the goods] must be said to begin." *Id.* at 69.

The taxing authority in *Spalding* argued that interruption in New York could have permitted the exporter to divert the goods. This Court rejected the argument of the prospect of diversion:

> "There was not the slightest probability of any such change and it did not occur. The purchase by [the exporter] was solely for the purpose of the [foreign purchaser] and for their account and risk. *Theoretical possibilities may be left out of account.* . . . The overt act of delivering the goods to the carrier marks the point of distinction. . . ."

Id. at 70 (emphasis added).

In *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929) (a review of both the Import-Export Clause and the Commerce Clause), this Court held unconstitutional a tax upon oil detained in tanks awaiting off-loading to ocean-going tankers bound for foreign ports. The Court noted as evidence of the export the lack of any local market for the oil at the jumping-off point. *Id.* at 109.

Similarly, Aeromexico took delivery in California by a common carrier committed to the export process; there was *Richfield's* "certainty" about the exports. Every single shipment crossed the border and arrived in Mexico City.

The parts were neither stored nor processed in San Ysidro. The San Ysidro delay was incident to export, and to nothing else. The parts served no purpose for Aeromexico in San Ysidro; they were there only to be transferred from truck to truck in the course of their trip to Mexico City. There was no prospect for diversion. The parts had started their journey at the edge of MDC's plant in Long Beach, and nothing diverted or intercepted them.[4]

The Petitioner's cited authorities, which uphold levies, merely apply the uncontroverted rule of law to facts different than MDC's. The Petitioner's cited cases involve lengthy delays at the border or delays for purposes other than export. *See Kosydar v. National Cash Register Co.*, 417 U.S. 62, 63-64, 69 (1974) ("machines relevant to this case were in storage in the Dayton warehouse, awaiting shipment;" "[t]itle and possession were in [the taxpayer];" "there simply had been no movement of the goods—no shipment, and no commencement of the process of exportation"); *Empresa Siderugica, S.A. v. County of Merced,* 337 U.S. 154, 157 (1949) (cement plant awaiting disassembly for foreign transport; "[o]n the tax date the movement to foreign shores had neither started nor been committed"); *Joy Oil Co. v. State Tax Commission of Michigan,* 337 U.S. 286, 289 (1949) ("fifteen-month delay at Dearborn barred immunity of petitioner's gasoline"); *Coe v. Town of Errol,* 116 U.S. 517 (1886) (logs at border awaited identification of buyer; shipment was indefinite); *Brown v. Houston,* 114 U.S. 622, 629, 632-33 (1885) ("The complainants were not

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[4] The Petitioner makes a secondary argument that unless a "legal obligation" exists to compel export, the goods have not entered the export stream. The Petitioner ignores the invoices and a purchase agreement which obligated MDC to export the parts to Mexico. No reported decision makes "legal obligation" the *sine qua non* of "certainty". Similar arguments were rejected in *Spalding,* 262 U.S., at 70, and *Richfield,* 329 U.S., at 80-83 (extensive analysis of the "certainty" requirement).

exporters; they did not hold the coal at New Orleans for exportation, but for sale there.").

The California Court of Appeal correctly analyzed the facts of this Court's prior decisions, and held the goods protected from levy:

> "The goods were delivered into the export stream and never diverted or delayed, other than for the border transfer without which they could not have completed their journey. . . . As in . . . *Richfield*, and *Spalding*, and unlike in *Empresa* and *Coe*, Aeromexico's clear plan to ship the parts to Mexico City for its own use was acted upon and continued uninterrupted to completion other than for unavoidable delays incidental to their journey."

(App. to Pet. for Cert. at B18-19.)[5]

The Petitioner's citation of *Itel Containers International Corp. v. Huddleston*, 113 S. Ct. 1095 (1993), is inapposite as a matter of law. *Itel* upheld a "taxation fall[ing] upon a service distinct from . . . goods and their value." *Id.* at 1106. As *Itel* stated: "[T]he tax here is not a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing State. . . . [I]t is not levied on the containers themselves or on the goods being imported in those containers." *Id.* As the California Court of Appeal observed below, citing *Itel*'s progenitors, *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 758 (1978) (the Court "permitted taxation of in-

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[5] There is no conflict in the Circuits or in the States. *See Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 821 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990) (exempt: jet fuel pumped to foreign tanker in State waters); *Connell Rice & Sugar Co. v. County of Yolo*, 569 F.2d 514, 518 (9th Cir. 1978) (not exempt: rice stored and accumulated for inspection at harbor elevators); and *Gough Industries, Inc. v. State Bd. of Equalization*, 51 Cal. 2d 746, 749, *cert. denied*, 359 U.S. 1011 (1959) (exempt: electrical parts detained at a freight packer awaiting transfer).

come from services connected to both imports and exports"), and *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 302, *reh. denied,* 424 U.S. 935 (1976) ("Petitioner's tires . . . were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation. . . ."), the "export exemption still applies to goods in the 'export stream.'" (App. to Pet. for Cert. at B13, n.4.) No component of services existed in MDC's sales of aircraft parts to Aeromexico.

CONCLUSION

The mere fact that the Aeromexico parts were delayed for less than 48 hours at San Ysidro, California for the sole purpose of transport to Mexican trucks does not defeat constitutional protection. The facts, and the decision of the California intermediate court, are consistent with prior decisions of this Court. There is no reason to grant the Petition. Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

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No. 92-1803

In The

Supreme Court of the United States

October Term, 1992

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Second Appellate District, Division One

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Pursuant to Supreme Court Rule 15, the Petitioner files this Reply to Respondent's Brief in Opposition to the Petitioner for A Writ of Certiorari. The purpose of this reply is to clarify new issues raised directly and by innuendo in Respondent's Opposition Brief.

ARGUMENT

I.

THE RECORD SHOWS THAT AEROMEXICO NEVER USED AM MEX INTERNATIONAL AS ITS FREIGHT FORWARDER WITH RESPECT TO THE TRANSACTIONS IN ISSUE

Rather than discussing what actually transpired with respect to the transaction in question the Respondent discusses what "typically occurs" with respect to the delivery of goods to Mexico.[1] In an attempt to convince the Court that the parts in question were exports immune from state sales tax because they were delivered to a freight forwarder the Respondent states that:

> Aeromexico used AM MEX International as its freight forwarder at the international border, San Ysidro, to make the truck transfers to Mexican trucks. Aeromexico used AM MEX's expertise in U.S. and Mexican customs regulations and fees.[2]"

Despite the claimed expertise possessed by AM MEX International with respect to U.S. and Mexican customs fees and regulations the record clearly shows that MDC's own witness testified at trial that all AM MEX International did was to lend its San Ysidro facilities to Aeromexico employees. (R.T. 35.)[3] The goods were never

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[1] See Respondent's Brief In Opposition at p. 2.

[2] Respondent's Brief In Opposition p. 2.

[3] Q. "So actually, if I understand your testimony, Mr. Scolari, the party who actually received the goods at San Ysidro was Aeromexico and not AM-MEX, is that correct?

received by freight forwarder AM MEX International in San Ysidro, California in preparation for their journey outside the United States. The parts were received by purchaser Aeromexico in San Ysidro who merely used the facilities of AM MEX[4]. Other than lending their facilities to Aeromexico employees stationed in San Ysidro AM MEX International had absolutely nothing to do with the parts in question which the taxpayer claims to be exempt from state sales tax because they allegedly were exports[5]. Despite the Respondent's assertion that there was merely a "48 hour delay" in exporting the goods to Mexico[6] the facts also indicate that there was no existing contract or legal obligation to export the parts to Mexico[7] when they arrived at San Ysidro despite the fact that the goods

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A. In our facilities, that is correct.

Q. So, in essence, all Aeromexico did was to use your facilities, isn't that correct, to take care of the transportation of the goods from San Ysidro to – across the border?

A. That is correct." (R.T. 35.)

[4] Q. "So actually, if I understand your testimony, Mr. Scolari, the party who actually received the goods at San Ysidro was Aeromexico and not AM-MEX, is that correct?

A. That is correct." (R.T. 35.)

[5] The First Amended Stipulation of Facts entered into between the parties specifically states in pertinent part that:

" . . . Aeromexico used AM MEX International's facilities . . . " (1st Amend. Stip. Facts ¶ 16, R.T. 26.)

[6] Respondent's Brief In Opposition at p. i.

[7] Q. "Did AM-MEX have any type of contract with Aeromexico with respect to transporting the goods from San Ysidro to Mexico?

A. Not at that time, no. We do now." (R.T. 35.)

might have been clearly marked, "for export to Mexico"[8] San Ysidro was the final destination of the goods. Under these facts the parts were not immune from their "share of costs of local services." *Joy Oil Co. v. State Tax Comm'n.*, 337 U.S. 286, 288 (1949)

II.

IT IS THE OBLIGATION TO EXPORT NOT THE ALLEGED LENGTH OF DELAY WHICH DETERMINES WHETHER AN ITEM IS IN THE CONSTITUTIONALLY PROTECTED EXPORT STREAM

Respondent's brief in opposition cites numerous cases where this Court has correctly concluded that a brief detention of an item in state does not place it outside the constitutionally protected export stream[9]. The factor present in all of those cases which is nonexistent in this case is the existence of a legal obligation to export the

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[8] The record reflects that bills of lading were issued both at Long Beach and San Ysidro. (R.T. 114.) The fact that the parts were marked "Export To Mexico" on the bills of lading issued at San Ysidro is not surprising since the trial court also found that, "all customs arrangements for importing into Mexico were made after shipment had been made to San Ysidro". (R.T. 114.) The decision of the Court of Appeals also recognizes this. (Appendix B9.)

[9] *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *Carson Petroleum Co. v. Vital*, 279 U.S. 95 (1929); *Empresa Siderugica S.A. v. Co. of Merced*, 337 U.S. 154 (1949); *Coe v. Errol*, 116 U.S. 517 (1886); *Joy Oil v. State Tax Comm.*, 337 U.S. 286 (1949). Cited at pp. 6 and 7 of Respondent's Brief In Opposition.

items which were taxed[10]. It was not a break in the export stream which caused the parts to be taxable but rather the absence of "certainty of foreign destination" which precluded the parts from ever entering the export stream until they left San Ysidro, California. (C.T. 113, 114.) Neither the Court of Appeals nor the Respondent explain how "certainty of foreign destination" was plain when the purchaser obtained title and possession to the parts in California giving them complete control over the item and effectively making it a "part of the general mass of property within the State, subject, as such, to its jurisdiction, and to taxation in the usual way . . . " *Coe v. Errol*, 116 U.S. 517, 525 (1886)[11].

CONCLUSION

Respondent does not dispute the facts underlying the transactions in question as set forth in Petitioner's Petition for Writ of Certiorari. Based on the Court of Appeals' misapplication of law interpreting the Import-Export Clause of the United States Constitution to those undisputed facts this Court should grant summary reversal, or, in the alternative issue a writ of certiorari to review the

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[10] Respondent incorrectly asserts at footnote 4 of their brief in opposition that a test similar to what they refer to as the "legal obligation" test was rejected in *Spalding* and *Richfield*. Those cases are devoid of any such assertion.

[11] After listening to the evidence the trial court concluded that "all customs arrangements for importing into Mexico were made after the shipment had been made to San Ysidro." (C.T. 114.)

opinion and judgment of the California Court of Appeal, Second Appellate District.

Respectfully submitted,

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